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No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

KEITH JACOBSON,
Petitioner,
v.

THE UNITED STATES OF AMERICA
Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the Government knows the defendant has committed no crime, is not planning to commit a crime and has never engaged in any criminal activity, whether the Government needs some cause, reason or suspicion to make petitioner the subject of five undercover attempts to induce the defendant to commit the offense of receiving child pornography through the mails extending over the course of twenty seven months before the petitioner finally purchases and accepts delivery of a single magazine which has been manufactured, advertised, sold and delivered to him by the Government?

2. Where the Government, as part of three unsuccessful undercover attempts to induce the petitioner to commit the offense of receiving child pornography through the mails obtains answers to sexual attitude surveys from the petitioner by assuring him that his responses are confidential and the use that will be made of them is a lawful use, whether the Government can rely on statements that the respondent is interested in "preteen sex", "stories with a gay theme" and "teenage sexuality" to prove predisposition to commit a crime when, after the surveys have been completed by petitioner, petitioner is finally induced in a fifth undercover operation to purchase and accept delivery of a single magazine depicting "minors in sex action fun?"

3. Where the Government has attempted and failed in three separate undercover operations covering two years of testing and soliciting to persuade the defendant to receive child pornography through the mails and the petitioner does not qualify either under the Attorney General's Guidelines for the conduct of undercover operations or the guidelines established by the Postal Inspectors for inclusion in the undercover operation in which petitioner is finally ensnared, whether the petitioner has been entrapped as a matter of law?

4. Where the Child Protection Act of 1984, 18 U.S.C. sec. 2252 (a) (2) and (b) provides a penalty of up to ten years imprisonment and a \$100,000.00 fine for receiving child pornography through the mails, whether the trial court should instruct the jury in the trial of the petitioner upon one count of violating said statute that the Government must prove that the defendant knowingly received child pornography through the mails *knowing such receipt to be unlawful* (underlined language omitted from instruction given)?

5. Whether there is a distinct Fifth Amendment "outrageous Government conduct" defense in federal criminal cases and if so how does it relate to entrapment?

6. If there is a distinct "outrageous government conduct" defense in federal criminal cases and the Government has persistently attempted to induce the defendant to commit a crime, fabricated fictitious criminal enterprises and manufactured, advertised, sold and delivered child pornography is this Government conduct outrageous in this case?

7. Where the defendant raises the entrapment defense, whether the trial court should define "inducement" as that term is used in the entrapment instruction and where the inducement is by deception, whether the court should also define "fraud?"

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OPINIONS BELOW

The Eighth Circuit's Panel Opinion is reported in 893 F.2d 999 (1990). The Eighth Circuit's Opinion on rehearing en banc is reported at 916 F.2d 467 (1990).

JURISDICTION

The judgment petitioner seeks to have the court review was entered on October 15, 1990. There is no applicable order for rehearing. No order has been entered extending the time in which to file the petition for writ of certiorari. Rule II(e)(iii), Rules of the Supreme Court is not applicable. The jurisdiction of this Court is invoked under 18 U.S.C. sec. 1254 (1).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

Title 18 U.S.C. sec 2252 (1986) :

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including through the mails; if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than \$100,000, or imprisoned no more than 10 years, or both, but, if such an individual has a prior conviction under this section, such individual shall be fined not more than \$200,000, or imprisoned not less than five years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than \$250,000.

Title 18 U.S.C. sec. 2256 (1986) :

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse (for the purpose of sexual stimulation); or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than the individual.

(5) "visual depiction" includes undeveloped film or videotape.

Fourth Amendment to the Constitution of the United States.

The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or prop-

erty, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

BASIS FOR FEDERAL JURISDICTION: Petitioner was indicted by a Federal Grand Jury and tried in the United States District Court for the District of Nebraska at Omaha on one count of violating Title 18 U.S.C. sec. 2252 (2), receiving child pornography that had been mailed.

STATEMENT OF MATERIAL FACTS: Keith M. Jacobson is 57 years old. He was born in Newman Grove, Nebraska, October 20, 1930 to a farm family. He graduated from Newman Grove High School in 1949 and helped his father farm for a year and half (T407).

He joined the Navy in early 1951 and saw sea duty aboard the U.S.S. Iowa and the U.S.S. Gerke. While aboard the Gerke he saw action in Won San Harbor during the Korean War (T408). He was honorably discharged on March 11, 1955 (T409). In the fall of 1955, he enrolled at Nebraska Wesleyan University under the G.I. Bill majoring in business administration (T410).

In 1958, Mr. Jacobson was convicted of driving under the influence of alcoholic liquor in Lancaster County, left school and joined the Army (T411). However, after his retirement from the Army, he enrolled in an off-campus degree completion program at Upper Iowa University and obtained a bachelor of arts degree in public administration (T411). Driving under the influence was the only offense he had ever committed prior to his indictment in this case (T422).

While in the Army, petitioner served in Korea twice (T412, 414), Italy (T414), Germany (T416), and Viet Nam (T415). He became an information specialist which involved him in newspaper publishing, news writing, troop indoctrination, and public relations (T413). He held the rank of Staff Sergeant (T413). While in Viet

Nam, he was assigned to the press center at Da Nang where he came under fire (T416). He was awarded the Bronze Star for his service in Viet Nam (T417) and also received the Army Commendation Medal.

He retired from the service at Fort Riley, Kansas in 1974 (T418). In 1975, he moved back to Newman Grove to be closer to his father who had suffered a stroke in 1972 (T418). In 1978, he moved to his family's farm a half mile east of Newman Grove where he raises a few head of livestock (T419).

After moving back to Newman Grove, Jacobson worked for a shopper's guide in a nearby town for a time and then accepted a job driving a school bus for the Newman Grove school district. In 1979, he was made supervisor which included the responsibility for the safety and repair of the four buses and three vans the school district employed (T421). Petitioner received a certificate on May 20, 1986, for his faithful service (T422).

Six witnesses from Newman Grove testified that petitioner had an excellent reputation in the community as a law abiding and truthful citizen (T274-316).

The petitioner described his sexual preference as "bisexual". He became interested in reading about gay issues, lesbian issues, health issues and gay legislative matters after he retired from the Army. He denied, however, that he was a practicing homosexual or ever had been (T423).

On February 4, 1984, petitioner ordered two magazines, Bare Boys I and Bare Boys II (E18A, 18B), and a brochure from a Dennis Odom doing business as Electric Moon in San Diego, California (T7). On May 11, 1984, the Government executed a search warrant on the Odom establishment and found petitioner's name on Odom's mailing list together with copies of the magazines and a receipt showing what Odom had mailed to Jacobson (T7). The two magazines were nudist magazines depict-

ing boys in their teens and early twenties in outdoor settings. Dr. Richard Dienspier, a psychologist and professor on human sexuality at the University of Nebraska testified that the magazines were not child pornography because the photographs did not show sexual intercourse, bestiality, masturbation or lascivious exhibition of genitals as mentioned by 18 U.S.C. sec. 2256 (T397). The Government did not challenge this testimony. The Government stipulated that petitioner's receipt of Bare Boys I and II was not a violation of Federal law (T8). The brochure (E17) was a newsletter which indicated stores in the United States and Europe which sold sexually oriented material. The Government offered no evidence that petitioner had ever ordered or received any items from these stores and petitioner denied doing so (T425).

Due to the fact that his name was on Odom's mailing list, the Government included Jacobson in a Postal Inspector's undercover operation called The American Hedonist Society. Petitioner's name and address was forwarded to Stuart O. Patten, a Postal Inspector and prohibited mailing specialist stationed at Omaha, Nebraska (T165). He sent Jacobson a sexual attitude survey and a membership application for the Society (T166, E7), which was an association of postal inspectors for the central region based in Madison, Wisconsin (T166). The society was, "a sting operation to try to get people to join it and perhaps trade through it" (T166). The format called for "testing" of the subject by means of the survey and a newsletter which was mailed four times a year to subjects who joined the society. The newsletter came for as long as the Postal Inspectors wished to send it (T171). The last paragraph of the sexual attitude survey states in capital letters:

I understand that the information which I have provided shall be held in strict confidence by the Society and all information received by me from the Society shall be held in strict confidence by me.

On February 21, 1985, Jacobson filled out the survey, sent his membership fee and thereafter received the newsletter. The Government offered no evidence that Jacobson ever traded anything with the Society or through it, let alone child pornography.

The Government, however, persevered. Patten retired March 3, 1985 (T710). In January, 1986, one Calvin Comfort (T176) was assigned to Patten's position. Comfort had been a letter carrier for three years, with two weeks of training in the restricted mailing of child pornography (T329). Although two postal inspectors who had preceded Comfort (T329:1) had showed no interest in petitioner, on May 27, 1986 (T335) Comfort initiated another undercover scheme involving two more postal service inventions, Heartland Institute for a New Tomorrow and Midlands Data Research (T333).

According to its contact letter, Midlands Data Research was "a small, old, established firm in Lincoln, Nebraska" conducting "consumer surveys on a variety of subjects" (E8). The subject of the "consumer survey" was another sexual preference and attitude test. Petitioner did not complete the survey (340:7), but sent back the contact letter on May 31, 1986, with a note stating, "Please feel free to send me more information. I am interested in teenage sexuality".

Comfort tried again. On July 28, 1986, Comfort, posing as "Jean Daniels", director Heartland Institute for a New Tomorrow, wrote petitioner explaining that Heartland was a lobbying organization seeking liberalization of sexually repressive legislation and importuning petitioner to complete and return the sexual survey (T369). On August 20, 1986, Jacobson did (E9, 9A). Comfort, still posing as Jean Daniels, then sent petitioner a list of five names of persons with supposedly similar sexual interest, all Comfort pseudonyms, with whom Jacobson could correspond (T341).

Petitioner did not (T342). Comfort pushed harder. Posing as "Carl Long" (T342), he wrote to the petitioner on September 17, 1986 (E23). His Carl Long identity was to "mirror" Jacobson, to become like him in order to gain more information (T342), and, if petitioner was inclined to do so, invite him to send child pornography through the mails (T343). Comfort wrote petitioner three times and petitioner responded twice (T344), then broke off the "Carl Long" correspondence. On one of these occasions, September 29, 1988, Jacobson sent Comfort a newspaper, "The New York Native" (E14A), which contained homosexual articles. The Government made no claim that this violated any laws.

Comfort did not institute a "mail cover" upon petitioner's mail (T348). This device allows a law enforcement agency to watch the mail coming to an individual for a period of thirty days to see who is sending mail to the petitioner (T248). Comfort was familiar with at least some of the persons who were sending child pornography (T350). If petitioner had been receiving any, it would be fair to infer that a "mail cover" would have disclosed that fact.

By February of 1987, petitioner had been the target of three sting operations in which he had had an opportunity to violate the law each time he received a letter from "Carl Long" or a newsletter from the Hedonist Society. Jacobson had given postal authorities no reason to believe he had violated the law or was thinking about violating it, let alone that he was engaged in a course of criminal conduct.

In 1986, one Ray Mack, the supervisor of a prohibited mails team of Postal Inspectors at Newark, New Jersey (T91) invented yet another undercover operation which, in 1987, was elevated to national scope and named "Project Looking Glass" (T94).

The operation was commenced by the Postal Inspection Service to target suspected pedophiles and others who

receive child pornography through the mails. *United States v. Mitchell*, 915 F.2d 521, (C.A. 9, 1990). On the sexual attitude survey Jacobson completed for "The American Hedonist Society," he stated that he was "opposed to pedophilia" (E7).

The Postal Inspection Service's unrelenting and ingenious invention of child pornography undercover operations is both remarkable and curious. According to the Government, one Catherine Stubblefield Wilson controlled about eighty percent of the United States Market for child pornography. According to Postal Inspector William Anderson, the American market for mail order child pornography "virtually dried up overnight" after Wilson was arrested in 1982 and her mailing list, consisting of many thousands of names and addresses, was distributed to postal inspectors nationwide. *United States v. Mitchell*, *supra*, footnote 5, 915 F.2d at 525.

The Justice Department concluded that subjects would be included in Project Looking Glass if their names had been found on a mailing list that had been seized by a Postal Inspector in the last seven or eight years and they had responded to at least one regional "sting" testing program in the last three years (T96) (T97). Mack described testing differently than Comfort, stating that it was a way to contact individuals who had committed a criminal offense or were in the act of committing a criminal offense (T92). By this admeasurement, Jacobson did not qualify for testing, and therefore, Project Looking Glass. Mack also stated that subjects were included only if the individual's name had come up from two independent sources (96:25). Petitioner did not qualify under this criteria either because the Hedonist Society and Heartland Surveys would not have been sent to petitioner but for his order from a single independent source, Electric Moon (T346).¹

¹ To get out of a testing program one can simply refuse to respond (T379). Or, a subject can send something saying he does not

Furthermore, the United States Attorney General's Guidelines on FBI Undercover operations 16 (Dec. 31, 1980) reprinted in Law Enforcement Undercover Activities: Hearings before the Select Committee to Study Law Enforcement Undercover Activities of Components of the Department of Justice, U.S. Senate, 97th Congress, 2d Sess. 86, 101 (1982) states that undercover operations offering an inducement to illegal activities are not to be approved unless:

(a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity.

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

William H. Webster, then director of the FBI testified during the Senate Select Committee hearings:

One of the basic standards for initiating an operation or for making a change in direction or a change in focus, which is one of the sore points we have observed in these various operations, currently appears in the Attorney General's Guidelines on Criminal Investigations, and that is that there must be facts and circumstances that reasonably indicate that a Federal criminal violation of the type to be investigated has occurred, is occurring or is likely to occur. In other words, a reasonable cause provision. . . . (Senate Hearings, supra, at 1055.) I have no problem with requiring an articulation of the reasons. I think we are doing that now, and we will

want to receive anything more from the particular front organization doing the testing. However, being dropped from one sting operation would not mean that the subject would be dropped from all. That would require "legal action" (T380). Of course, to institute that a subject would need to know he has a subject.

certainly do it in the future. . . . (Senate Hearings at 1055.)

These same Attorney General's Guidelines attempt to minimize the possibility of overly persistent solicitation by limiting the initial duration of an undercover operation to six months. Gersham, *Abuse, The Judiciary and the Ethics of Entrapment*, 91 Yale L.J. 1565 n.100 (1982) quoted in *United States v. Dion*, 762 F.2d 674, 686 (C.A.8, 1985).

Therefore, before he was included in Project Looking Glass, the Government knew what Jacobson bought from Electric Moon three years earlier. The Government knew it was not child pornography. The Government also knew that Jacobson had rebuffed numerous attempts to induce him to send or receive child pornography offered through the newsletter of The American Hedonist Society and the "Carl Long" correspondence. The Government knew that petitioner was opposed to pedophilia. The Government knew that petitioner did not fit the Attorney General's guidelines and the Postal Inspection Service's criteria for inclusion in Project Looking Glass. The Government knew Jacobson had been a target of undercover operations for at least eighteen months longer than the Attorney General's Guidelines permit.

Calvin Comfort knew that petitioner was "interested in teenage sexuality," and "stories with a gay theme" (E7). Comfort recognized a weakness which he could exploit.

A contact letter (E1) ostensibly from the "Far Eastern Trading Co. Ltd." was sent to petitioner March 23, 1987. The letter states, "All material that you order from your (sic) company will be sent to you through our branch office in the Virgin Islands. After consultations with American solicitors, we have been advised that once we have posted our material through your system, it cannot be opened for any inspection without a court order".

Petitioner completed a coupon asking for more information and was sent a catalog (E2) from which he ordered "Boys Who Love Boys", the material he is charged by the indictment with receiving. The catalog described the magazine as, "11 year old and 14 year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys you will be delighted with this". Mack prepared and copied it on post office word processors (T106).

"Boys Who Love Boys", itself, is not a magazine but a copy of a magazine that had been seized by customs. The original was produced in Denmark (T157). The Postal Inspectors did not have enough seized material to fill all orders so they produced copies on a postal service copying machine in Washington D.C. (T143, T144). Mack then mailed the photocopied magazine to Comfort (T112).

At the same time, the Customs Service had organized its own sting, "Operation Borderline" (T26). Its purpose was to "target people who were involved in alleged importing of child pornography" (T26). Obviously, Comfort had no evidence that Jacobson was doing this.

Canadian officials opened a post office box in Hull, Quebec Canada, under the name of Produit Outaouais (T27). Persons were included if their names appeared on a source document in another agency's files (T29). Jacobson's name was included (T29) from two sources, one of the test programs previously conducted by the Postal Service and from the Electric Moon investigation (T30).

Customs printed a brochure in French and English listing available materials for sale (T31). The materials were photos taken from within the pages of sexually explicit magazines depicting children (T32) printed specially for the Customs Service by Kodak in Chicago (T48).

Jacobsen ordered a set of photographs entitled Piccolo (T37). The Piccolo set was not delivered (T52).

On June 16, 1987, Comfort made a controlled delivery of "Boys Who Love Boys" to Jacobson (T219). A "controlled delivery" means that he took the envelope containing the magazine to Newman Grove, placed it on a desk in the post office where he could see it, had the postmaster put a notice to call at the window in the petitioner's box and, when he responded to the notice, observed the postmaster hand petitioner the envelope (T219-228).

Comfort then called a waiting postal inspector in Omaha and obtained a search warrant for Jacobson's residence (T229). Comfort, Madison County Sheriff Vern Hjorth and three Customs Agents then went to Jacobson's home to execute the warrant (T230). At least three of them were armed (T435).

Jacobson was returning from his morning coffee (T431). Two cars followed him into his driveway and parked so that he was blocked (T434). Comfort approached petitioner, exhibited credentials and the search warrant and said, "Let's go in the house". (T435). The search party and petitioner entered petitioner's home and spent the next hour and forty minutes going through it (T230). The only trial evidence produced by the search were the two lawfully obtained child nudist magazines which the Government had known since the raid on Electric Moon in 1984 that the petitioner possessed and, of course, "Boys Who Love Boys," which the Government had just given him.

Petitioner was indicted on September 14, 1987, on one count of receiving a visual depiction the production of which involved the use of a minor engaging in sexually explicit conduct (CR4) which magazine had been mailed.

Petitioner was tried to a jury consisting of nine women and three men beginning April 22, 1988. The jury returned a verdict of guilty on April 26, 1988 (C.R. 113). Sentence was passed June 30, 1988.

Respondent appealed his conviction to the Eighth Circuit Court of Appeals. On January 12, 1990, a panel of the Eighth Circuit Court of Appeals reversed the respondent's conviction holding that the petitioner had been entrapped as a matter of law because the Government "did not have a reasonable suspicion based upon articulable facts" that Jacobson was predisposed to commit the crime with which he was charged. *United States v. Jacobson*, 893 F.2d 999 (C.A. 8, 1990). Upon the petition of the United States Attorney for the District of Nebraska and his suggestion for rehearing en banc, the Eighth Circuit granted rehearing en banc. (889 F.2d 1549).

Upon rehearing en banc, the Eighth Circuit Court of Appeals reinstated petitioners conviction, holding that no reasonable suspicion was necessary because "Jacobson had no constitutional right to be free of investigation." *United States v. Jacobson*, 916 F.2d 467 (C.A. 8, 1990).

ARGUMENT

1. In the District Court and in the Circuit Court, petitioner contended that evidence of predisposition was evidence that the defendant had committed a crime, was about to commit a crime or was engaged in a course of criminal conduct.

The Government offered no such evidence. Instead, the Government took scattered answers from the sexual attitude surveys obtained before petitioner's inclusion in Project Looking Glass, Bare Boys I and II and the Carl Long correspondence and claimed that these items demonstrated predisposition.

Petitioner urged that this was only proof of a status, i.e., petitioner's interest in "stories with a gay theme." Petitioner pointed out that:

The crime punished by the statute against the sexual exploitation of children, however, does not consist in the cravings of the audience. Private fantasies

are not within the statute's ambit. The crime is the offense against the child. . . . *United States v. Wiegand*, 812 F.2d 1239 (C.A. 9, 1987).

Petitioner argued that prior Eighth Circuit cases had always required the Government to show a "readiness and willingness to break the law," *United States v. Dawson*, 467 F.2d 668 (C.A. 8, 1978) to prove predisposition and that this was consistent with cases from the other circuits. Cf. *United States v. Thoma*, 726 Fed. 1191 (C.A.7, 1984); *United States v. Esch*, 832 F.2d 531 (C.A.10, 1987). Petitioner's contention was bottomed on the language of Chief Justice Warren in *Sherman v. United States*, 356 U.S. 369, 2 L.Ed.2d 848, 853, 78 S.Ct. (1958) that the Government was required to offer more than evidence of "the weakness of an innocent party" to overcome the defense of entrapment. Since there was no objective evidence from which rational minds could conclude that defendant had committed a crime, was committing a crime or was likely to commit one when petitioner was made the subject of Project Looking Glass, petitioner alleged that he was entitled to summary acquittal under such prior Eighth Circuit cases as *United States v. Lard*, 743 F.2d 674 (C.A. 8, 1978) and *United States v. Dion*, *supra*.

Judge Heaney, who wrote the panel opinion, implicitly accepted the petitioner's view, requiring the government to have a "reasonable suspicion based upon articulable facts that Jacobson had committed a similar crime in the past or was likely to commit such a crime in the future."

This rule quite clearly tracks Department of Justice Guidelines for undercover operations. Moreover it is clearly presaged by other Supreme Court and Circuit Court opinions.

In *Grimm v. United States*, 156 U.S. 604, 39 L.Ed. 550, 15 S.Ct. 470 (1895), one of the *Decoy Letter Cases*, the court affirmed a conviction for dispensing pornography

through the mails without specifically mentioning an entrapment defense. The court held that Grimm's conviction could stand even though the contraband was solicited by an undercover Government agent because the agent "suspected that the defendant was engaged in a business offensive to good morals, sought information directly from him (and it) does not appear that it was the purpose of the post office inspectors to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." *Id.*, 546 U.S. 610.

The Ninth Circuit court overturned a conviction of illegally importing Chinese in *Woo Wai v. United States*, 223 Fed. 412 (C.A. 9, 1915). The court's conclusion focused on the absence of a reasonable suspicion to conclude that petitioner was engaged in ongoing criminal activity:

... here is no evidence that prior to the time when the detectives first approached Woo Wai, any of the defendants had ever been engaged in the unlawful importation of Chinese, or had ever committed or thought of committing any offense against the immigration laws.

The same state of the record led the Eighth Circuit to overturn a conviction for selling morphine in *Butts v. United States*, 279 Fed. 38, 18 A.L.R. 143 (C.A. 8, 1921), where it was said:

There was ample, if not conclusive evidence . . . that . . . defendant had never committed any such offense as the officers of the government arrested and prosecuted him for prior to the time when they induced him to do the acts disclosed by his testimony. There is no evidence that he had ever contemplated, much less intended to sell any morphine. He had never done so.

In *Casey v. United States*, 276 U.S. 413, 72 L.Ed. 632, 48 S.Ct. 373 (1928), overruled on the grounds, *Turner*

v. United States, 393 U.S. 398, 24 L.Ed.2d 610, 90 S.Ct. 642 (1970), the Court refused to consider an entrapment defense because it had not been properly raised. However, it noted that had the defense been preserved, it would probably have failed because:

... there was probable cause to believe Casey was a habitual drug user who had supplied drugs to inmates on prior occasions (and because he) was in no way induced to commit the crime beyond the simple request of Cicero to which he seems to have acceded without hesitation and as a matter of course. (*Id.* at 419).

In *United States v. Dawson*, *supra*, the Eighth Circuit itself said that the Government would need to suspect a crime was underway before targeting a subject for investigation.

Two recent opinions also indicate that the Circuit Courts retain a concern over the manner in which subjects are selected for inclusion in Government undercover operations. *United States v. Hunt*, 749 F.2d 1078 (C.A. 4, 1984) affirmed the conviction of a state court judge on bribery charges but the court condemned indiscriminate Government fishing expeditions and warned that the Government must have a reasonable basis in fact before focusing an undercover operation on a subject.

So did the Ninth Circuit on *United States v. Luttrell*, 889 F.2d 806 (C.A. 9, 1989) rehearing en banc granted 906 F.2d 1384 (1990):

We think police officers violate constitutional norms, when without reasoned grounds, they approach apparently innocent individuals and provide them with a specific opportunity to engage in criminal conduct. . . . The principle that persons who are scrupulously conforming their conduct to the requirements if the law should not be made the objects of highly intrusive, random police investigations is an important ingredient of our liberty. We see substantial mis-

chief in any pattern of law enforcement that arbitrarily targets for intrusion the lives of individuals who, to all reasonable appearances are minding their own business.

2. However, on rehearing before the Eighth Circuit sitting en banc, Judge Heaney's cautious approach was detonated by an opinion with explosive constitutional potential. The heart of the Eighth Circuit's en banc opinion begins:

In this circuit we review the government's involvement in undercover investigations under due process principles. . . . (Citations omitted).

Due process limitations 'come into play only when the government activity in question violates some protected right of the defendant.' *Hampton v. United States*, 425 U.S. 484, 490 (1976) (emphasis omitted).

The language within the quotation marks is from the plurality opinion in *Hampton v. United States*, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976). In *Hampton*, petitioner admitted he was predisposed to sell heroin to an undercover DEA agent.

At his trial, however, Hampton testified that Hutton, a DEA informer, had proposed they sell counterfeit heroin to gullible acquaintances. He contended that Hutton had furnished him the supposedly counterfeit drug, which turned out to be the real thing. He requested an entrapment instruction which stated in part:

If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

The instruction was refused, and the Eighth Circuit affirmed, relying on *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973).

On certiorari to the Eighth Circuit, the Supreme Court affirmed. Three judges were of the opinion that:

(In *Russell*) We ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established. . . .

The remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, is solely in the defense of entrapment. As noted, petitioner's *conceded predisposition* (emphasis supplied) rendered this defense unavailable to him.

To sustain petitioner's contention here would run directly contrary to our statement in *Russell* that the defense is not intended "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, *subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations*" (emphasis supplied).

The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government Activity in question violates some protected right of the *defendant*. (emphasis in opinion). Here, as we have noted, the police, Government informer, and the defendant acted in concert with one another. If the result of the governmental activity is "to implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission . . .," *Sorrells*, at 442, 77 L.Ed. 413, 53 S.Ct. 210, 86 A.L.R. 249, the defendant is protected by the defense of entrapment.

Two judges concurring in the result were of the opinion that neither the difficulties which attend the notion that due process of law can be embodied in fixed rules

nor the practicalities of combating the narcotics traffic required the adoption of a rule which would never prevent the conviction of a predisposed petitioner. The concurring justices also said:

The plurality's use of the 'chancellor's foot' passage from *Russell*, ante at 490, 48 L.Ed.2d 119, may suggest that it would also foreclose reliance on our supervising power to bar conviction of a predisposed defendant because of outrageous police conduct. Again, I do not understand *Russell* to have gone so far. There we indicted only that we should be extremely reluctant to invoke the supervising power in cases of this kind because that power does not give the "federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it does not approve."

Three other justices dissented, taking the view first, that ~~the~~ focus of the entrapment defense "is not on the properties and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards to which common feelings respond, for the proper use of Governmental power.' . . ." *Russell*, 36 L.Ed.2d at 378; and second, that even taking a "subjective" approach to the defense of entrapment, "the police activity in this case was beyond permissible limits." *Hampton*, 48 L.Ed.2d at 123.

Since *Hampton*, the Circuit Courts have adopted a defense of "outrageous government conduct" distinct from entrapment taken from the concurrence and based upon the Fifth Amendment and the supervisory power. Anno 97 A.L.R. Fed. 273 (1990). However, "a delineation of the defense, and in particular, its relationship to the entrapment defense, remains, 'at best elusive'" *United States v. Driscoll*, 852 F.2d 84 (C.A. 3rd, 1988) quoting *United States v. Janotti*, 673 F.2d 578 (C.A. 3rd, 1982).

This case clearly demonstrates the difficulty which lower courts have with the relationship of a due process

defense to entrapment. In the first entrapment case considered by the Court, *Sorrells v. United States*, *supra*, the Court declared that the entrapment defense was available to the accused not on constitutional grounds but as a matter of statutory construction. *Sorrells* rejected Circuit Court opinions which placed the grounds of entrapment on "public policy," e.g. *Butts v. United States*, 273 Fed. 35 (C.A. 8, 1921) and estoppel e.g. *Newman v. United States*, 279 Fed. 131 (C.A. 4, 1925). The majority opinion by Chief Justice Hughes states:

Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. . . . We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of Congress in enacting this statute that its processes of detection and enforcement would be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to link them to its commission and punish them. We are not forced by the letter to do violence to the spirit and purpose of this statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar prosecution. If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once 'inconsistent with that policy and abhorrent to the sense of justice.' This view does not derogate from the authority of the court to deal appropriately with abuses of its processes and it obviates the objection to the exercise by the court of a

dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall within the statute.

Mr. Justice Roberts, concurring, thought that the judgment should be reversed with instructions to quash the indictment. In his view, the issue was always one of law for the court. He said:

The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents.

In *Sherman v. United States*, *supra*, the Court held that the facts established an entrapment of the petitioner as a matter of law. The majority opinion notes that it had been suggested that, "we should reassess the doctrine of entrapment according to principles announced in the separate opinion of Mr. Justice Roberts in *Sorrells v. United States*, . . ." 2 L.Ed 853, 854. The Court declined this approach:

Not only was this rejected by the Court in *Sorrells*, but where the issue has been presented to them, the Courts of Appeal have since *Sorrells* unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury. . . . (*Id.* at 854).

In *United States v. Russell*, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973), the Court was again asked to reconsider the theory of entrapment. *Id.* at 36 L.Ed.2d 372. Like Hampton, Russell admitted that he was predisposed and that traditional entrapment, where the Government creates the criminal enterprise, "plays on the weakness of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted," (*Sherman* at 2 L.Ed.2d 853) did not apply. Instead, he argued that the level of the Government involvement in the manufacture of methamphetamine was

so high that a criminal prosecution for the drug's manufacture violated the fundamental principles of due process. He claimed that the same factors which led the Court to apply the exclusionary rule to illegal searches and seizures and confessions should bar his conviction.

The Court rejected this argument. Mr. Justice Rehnquist, writing for the majority, pointed out that the situations which gave rise to the exclusionary rule were grounded on the Government's failure to observe its own laws. He noted that the Government agent who furnished some of the phenyl-2-propanone which Russell used to manufacture methamphetamine "violated no independent constitutional right of the respondent (,) . . . Nor . . . any federal statute or rule or committed any crime in infiltrating the respondent's drug enterprise." *Id.* at 36 L.Ed.2d 373.

Russell also asked the Court, "as an alternative to his constitutional argument that we broaden the nonconstitutional defense of entrapment. . . ." *Id.* at 36 L.Ed.2d 375. The Court said:

We are content to leave the matter where it was left by the court in *Sherman*.

"The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, "A different question is presented when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." "

Thus, the Eighth Circuit's en banc opinion steps off smartly on the wrong foot. Entrapment is not a constitu-

tional defense. It is a defense implied from the intention of Congress not to sanction the punishment of crimes created by over zealous federal authorities. In *Sorrells*, *Sherman*, *Russell* and *Hampton*, dissents advocated a due process rationale for the defense but that view has been expressly renounced four times. The cases cited in the en banc opinion as holding, "we review the government's involvement in undercover operations under due process principles," all say either expressly or impliedly that the Government undercover operations may be reviewed both under entrapment principles and due process—supervisory principles.

Having switched the theory of entrapment from statute to constitution, the Eighth Circuit borrows the *Hampton* plurality's language that, "the Fifth Amendment come(s) into play only when the Government activity in question violates some protected right of defendant." The Eighth Circuit ignores the sentence after next in the *Hampton* plurality opinion, "If the result of government activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission. . . ' *Sorrells*, *supra*, at 442. . . . the defendant is protected. . . ." So defendant is protected by a judicially fashioned rule to enforce a statutory limitation.

Then the opinion says, "Jacobson has no constitutional right to be free of investigation." That merely begs the question because it announces the conclusion that everyone is always subject to investigation at any time for no reason. It holds that even though the Government knew that Jacobson had committed no crime, was not planning to commit one and was not engaged in ongoing criminal activity, and even though Justice Department regulations and Postal Service guidelines indicated that Jacobson should be left alone, the authorities nevertheless could properly continue to entice him to violate the law because

he is always subject to investigation.² This rule means the end of the entrapment defense because it focuses solely on the Government's right to investigate and denies the citizen protection from Government activity which implants in the mind of an innocent person the disposition to commit the alleged offense and induces him to commit it.

The en banc opinion then goes on to say that: "Jacobson does not claim the government's decision to investigate him deprived him of any right secured him by the constitution. Nevertheless, Jacobson borrows from the rule of particularized suspicion that governs investigatory detentions, *Terry v. Ohio*, 392 U.S. 1, 27 (1968). There is no constitutional basis for this borrowing since the Government's decision to investigate Jacobson did not encroach on Jacobson's 'right to personal security.'"

This is strange and frightening reasoning. Neither petitioner nor Judge Heaney borrowed from *Terry*. The borrowing was from the Attorney General's Guidelines, the Postal Inspector's own criteria for subjects to be included in Project Looking Glass and prior Supreme Court and Circuit Court opinions indicating that the Government must have some reasonable suspicion or cause to conclude that a subject has committed, is committing or is likely to commit a crime before he may be targeted for undercover solicitation to engage in criminal activity.

² The Eighth Circuit's en banc suggestion that Jacobson corresponded with "another adult who shared his interest in child erotics" is simply not sustained by any evidence. 916 F.2d 467 (C.A. 8, 1990).

CONCLUSION

Judge Heaney's rule requiring reasonable suspicion that a similar crime has been committed or is likely to be committed in the future before targeting subjects for intrusive undercover operations is about as clear and simple as any that could be announced. It avoids the exercise by the court of a "dispensing power." It leaves the law pretty much where it was left by *Sorrells* and *Sherman*. It provides suitable guidance for law enforcement officials based upon administrative regulations they have imposed upon themselves. It answers a question these officials need answered by the judiciary, that is, how is the government to know when it may employ undercover operations against specific individuals?

The en banc opinion, however, turns entrapment on its head. It says entrapment is a constitutional defense, it must be analyzed under due process principles. Due process can never avail, however, because "no one has a constitutional right to be free from investigation" even if there is no reason to investigate.

All that petitioner asked the Eighth Circuit to do was articulate a judicially fashioned rule to enforce a previously announced statutory limitation upon the Government's execution of the federal criminal laws.

All petitioner desired was an enunciation of the common thread running through entrapment cases similar to his own. Judge Heaney, drawing on language of long established precedent and government regulations, gave it to him.

The Eighth Circuit's en banc opinion not only obliterates a rational element of the entrapment defense, it upsets the law of the entire entrapment area, blending the worst from Supreme Court minority and plurality opinions to encapsulate a dangerous idea that could lead to completely uncontrolled Government undercover investigations.

The Eighth Circuit has decided important questions of federal law in a way which conflicts with applicable decisions of this Court. It has decided important questions about the entrapment and "outrageous government conduct" defenses which have not been, but should be, settled by the Supreme Court.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2097NE

UNITED STATES OF AMERICA,
Appellee,

v.

KEITH M. JACOBSON,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

Submitted: May 17, 1990

Filed: October 15, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit
Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON,
FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM,
Circuit Judges, En Banc.

FAGG, Circuit Judge.

A jury convicted Keith M. Jacobson of knowingly re-
ceiving through the mails sexually explicit material de-

picting a minor. See 18 U.S.C. § 2252(a)(2) (Supp. V 1987). Jacobson appeals, and we affirm.

When police searched a California pornography bookstore, they discovered Jacobson's name on the bookstore's mailing list. Jacobson had ordered three items from the bookstore, two magazines featuring photos of nude adolescent boys and a brochure listing stores in the United States and Europe selling sexually explicit materials. Posing as a member of a hedonist organization, a postal inspector mailed Jacobson a sexual attitude survey and a membership application. Jacobson paid the membership fee to receive a quarterly newsletter from the organization and returned the survey expressing his preference for preteen sex. Later, a postal inspector mailed Jacobson another survey. Jacobson responded positively, "Please feel free to send me more information. I am interested in teenage sexuality." The postal inspector then mailed Jacobson a list of pen pals with similar sexual interests, and Jacobson began corresponding with pen pal Carl Long, the undercover identity of a postal inspector. Jacobson sent Carl Long a newspaper for homosexuals and two letters. Another postal inspector sent Jacobson a letter inviting him to order a child pornography catalogue. Jacobson requested the catalogue and then ordered *Boys Who Love Boys*, a magazine advertised in the catalogue. The catalogue described *Boys Who Love Boys* as "eleven year old and fourteen year old boys get it on in every way possible. Oral, anal sex and heavy masturbation. If you love boys, you will be delighted with this." Jacobson also ordered a set of sexually explicit photographs of young boys from another brochure a customs service agent mailed him. The photographs were never delivered to Jacobson. Following a controlled delivery of the magazine, postal inspectors arrested Jacobson when they searched his home and found *Boys Who Love Boys*.

All told, the postal inspectors mailed Jacobson two sexual attitude surveys, seven letters measuring his appetite

for child pornography, and two sex catalogues. Jacobson responded with interest on eight occasions.

On appeal, Jacobson contends the government cannot begin an undercover investigation of a suspected person unless the government has reasonable suspicion based on articulable facts that the suspected person is predisposed to criminal activity. Although Jacobson did not raise this legal issue in the district court, both the government and Jacobson were given an opportunity to brief and argue the issue before the court en banc. We thus proceed on the premise that this issue is properly before us. *In re Modern Textile*, 900 F.2d 1184, 1191 (8th Cir. 1990).

Apart from any question of whether the government's investigatory conduct deprived Jacobson of due process of law, Jacobson contends we should bar the government from obtaining a conviction in his case because the government did not have reasonable suspicion of wrongdoing on his part before targeting him for an undercover investigation. Jacobson argues this bar should apply even when the character of the government's investigation is not outrageous. We disagree.

In this circuit, we review the government's involvement in undercover investigations under due process principles. *United States v. Irving*, 827 F.2d 390, 393 (8th Cir. 1987) (per curiam). The same is true of other courts of appeals. See *United States v. Miller*, 891 F.2d 1265, 1267 (7th Cir. 1989); *United States v. Driscoll*, 852 F.2d 84, 86-87 (3d Cir. 1988); *United States v. Jenrette*, 744 F.2d 817, 823-24 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States v. Gamble*, 737 F.2d 853, 856-60 (10th Cir. 1984); *United States v. Myers*, 635 F.2d 932, 941 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

Due process limitations "come into play only when the [g]overnment activity in question violates some protected right of the defendant." *Hampton v. United States*, 425

U.S. 484, 490 (1976) (emphasis omitted). Jacobson has no constitutional right to be free of investigation. *United States v. Trayer*, 898 F.2d 805, 808 (D.C. Cir. 1990), petition for cert. filed, No. 89-7764 (June 13, 1990). Indeed, Jacobson does not claim the government's decision to investigate him deprived him of any right secured by the constitution. Nevertheless, Jacobson borrows from the rule of particularized suspicion that governs investigatory detentions, *Terry v. Ohio*, 392 U.S. 1, 27 (1968) to narrow the government's power to initiate undercover investigations. There is no constitutional basis for this borrowing since the government's decision to investigate Jacobson did not encroach on Jacobson's "right to personal security." *Id.* at 9. Jacobson's demand for particularized suspicion runs against the grain "of the post-*Hampton* cases decided by the courts of appeals [holding] that due process grants wide leeway to law enforcement agen[ts] in their investigation of crime." *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983); see also *Hampton*, 425 U.S. at 495 n.7 (Powell, J., concurring).

We thus join with the courts of appeals that hold the constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation. See *Jenrette*, 744 F.2d at 824 & n.13; *Gamble*, 737 F.2d at 860; *United States v. Thoma*, 726 F.2d 1191, 1198-99 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); *United States v. Jannotti*, 673 F.2d 578, 609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *Myers*, 635 F.2d at 941; see also *United States v. Steinhorn*, 739 F. Supp. 268 (D. Md. 1990). But see *United States v. Luttrell*, 889 F.2d 806, 812-14 (9th Cir. 1989) (constitutional norms require reasoned grounds for undercover investigations), reh'g en banc granted, 906 F.2d 1384 (1990). To hold otherwise would give the federal judiciary an unauthorized "veto over law enforcement practices of which it [does] not approve." *United States v. Russell*, 411 U.S. 423, 435 (1973); see also *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (judges are

not free to impose their personal notions of fairness on law enforcement officers under the guise of due process). In our view, when the government's investigatory conduct does not offend due process, the mere fact the undercover investigation is started without reasonable suspicion "does not bar the conviction of those who rise to its bait." *Jannotti*, 673 F.2d at 609.

Jacobson next contends the government's investigatory conduct was outrageous and violated his due process rights. This contention is without merit. We recognize due process bars the government from invoking judicial process to obtain a conviction when the investigatory conduct of law enforcement agents is outrageous. *Gunderson v. Schlueter*, 904 F.2d 407, 410-11 (8th Cir. 1990) (citing *Hampton*, 425 U.S. at 492-95 (Powell, J., concurring); *Russell*, 411 U.S. at 431-32). Because the government may go a long way in concert with the investigated person without violating due process, *United States v. Musslyn*, 865 F.2d 945, 947 (8th Cir. 1989) (per curiam), the level of outrageousness needed to prove a due process violation "is quite high," *Gunderson*, 904 F.2d at 410. Indeed, the government's behavior must shock the conscience of the court. *Id.* (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)).

We simply cannot characterize the government's conduct in Jacobson's case as outrageous. Having discovered Jacobson's name on a pornographer's mailing list, the government pursued its investigation over a period of twenty-nine months by mailing surveys, letters, and catalogues to Jacobson. Jacobson responded, remitting a membership fee, requesting more information, corresponding with another adult sharing his interest in child erotica, and finally ordering obscene magazines and photographs depicting "young boys in sex action fun." The postal inspectors did not apply extraordinary pressure on Jacobson. The inspectors merely invited Jacobson to purchase pornographic material through the mail. See *Kaminski*,

703 F.2d at 1009 (the offer of reasonable inducements is a proper means of investigation). Unlike face-to-face contacts, Jacobson easily could have ignored the contents of the mailings if he was not interested in them. Similar undercover operations aimed at child pornography collectors "have withstood the constitutional challenge [Jacobson] now raises." *Musslyn*, 865 F.2d at 947 (citations omitted).

Jacobson also contends he was entrapped as a matter of law. We cannot agree. The jury rejected Jacobson's entrapment defense. Jacobson argues, however, the evidence clearly shows entrapment: the postal inspectors originated the criminal plan, implanted the disposition to purchase child pornography into Jacobson's otherwise innocent mind, and Jacobson ordered the illegal magazine at their behest. See *United States v. Pfeffer*, 901 F.2d 654, 656 (8th Cir. 1990). We view the evidence in the light most favorable to the government in deciding whether there is a jury issue on entrapment, *id.*, and having done so, we conclude this is not a case in which the government was a manufacturer rather than a detector of crime.

Entrapment is established as a matter of law only when the absence of defendant's predisposition to commit a crime is apparent from the uncontradicted evidence. *Thoma*, 726 F.2d at 1197. Having considered the factors that bear on a criminal defendant's predisposition, *id.*, we are convinced the district court properly submitted the question of Jacobson's entrapment to the jury. The government presented ample evidence that the postal inspectors only provided Jacobson with opportunities to purchase child pornography and renewed their efforts from time to time as Jacobson responded to their solicitations. Indeed, the panel's opinion recognized Jacobson's response to a survey mailed to him by the postal inspectors "indicated a predisposition to receive through the mails sexually explicit materials depicting children,"

United States v. Jacobson, 893 F.2d 999, 1000 (8th Cir. 1990), and "justif[ied] the decision to offer Jacobson the opportunity to purchase illegal materials through the mail," *id.* at 1001. Jacobson was not entrapped as a matter of law.

Finally, Jacobson contends the district court committed error in admitting certain evidence and in failing properly to instruct the jury. We have carefully considered these contentions and find them without merit.

We thus affirm Jacobson's conviction.

LAY, Chief Judge, dissenting

In *Hampton v. United States*, 425 U.S. 484 (1975), the Supreme Court recognized that "the entrapment defense 'focus[es] on the intent or predisposition of the defendant to commit the crime,' rather than upon the conduct of the Government's agents." *Id.* at 488 (quoting *United States v. Russell*, 411 U.S. 423, 429 (1973)); see also *United States v. Thoma*, 726 F.2d 1191, 1197 (7th Cir. 1984), *cert. denied*, 467 U.S. 1228 (1984) (entrapment is established as a matter of law if the uncontroverted evidence indicates that a defendant was not predisposed to commit a crime).

In the present case, it is clear the government entrapped Jacobson as a matter of law. Jacobson is a fifty-seven year old farmer from Newman Grove, Nebraska. Prior to his conviction, Jacobson's criminal record reflected only a 1958 conviction for driving while under the influence.

On February 4, 1984, Jacobson lawfully ordered from Dennis Odom, a California businessman, two nudist magazines and a brochure. Several months later, the government obtained Odom's mailing list, which included Jacobson's name. Although the government possessed no information that Jacobson had previously purchased obscene materials, he nevertheless became the target of five undercover sting operations. Over a period of two and one-half

years, the government, using as a subterfuge various fictitious organizations, repeatedly solicited Jacobson through the mail to purchase illegal pornography. Jacobson finally succumbed to the government's pressure by ordering "Boys Who Love Boys," a pornographic magazine.

From the uncontroverted facts in this case, it is readily apparent that Jacobson was not predisposed to commit the crime of receiving through the mails sexually explicit materials depicting a minor. The government contends that Jacobson had the requisite predisposition based on his answer to a survey that indicated he was interested in pre-teen sex magazines. Jacobson's response merely demonstrates that the government set out to entrap him because he had legally ordered two magazines that later proved to be obscene. Based on Jacobson's prior history, it is not clear that he would knowingly and voluntarily violate the law by purchasing obscene materials. The evidence fails to show that Jacobson was predisposed to commit the crime of which he was ultimately convicted.

I find the government's conduct in this case to be reprehensible. The government invested considerable time and money to prosecute a man who never would have committed a crime but for the government's encouragement. The government should not concentrate its efforts on incriminating innocent individuals; rather it should strive to suppress criminal behavior.

HEANEY, Senior Circuit Judge, dissenting.

Keith Jacobson's conviction should be set aside. Prior to instituting the sting, the Postal Service possessed no evidence giving rise to a reasonable suspicion that Jacobson, a 57-year old, law-abiding, Nebraska farmer with a 20-year record of honorable service in the armed services of the United States, had violated child obscenity laws in the past or was likely to do so in the future. The targeting of Jacobson violated federal law enforcement guidelines requiring an investigative agency to have a reason-

able suspicion before investigating an individual that the prospective target is engaging, has engaged, or is likely to engage in illegal activities of a similar type.

Jacobson's conviction should also be set aside because the conduct of the Postal Service was outrageous, not only for the reason previously stated, but also because the Service made at least ten mailings to Jacobson over a period of 27 months, January 1985 to May 1987, before he succumbed to its solicitations to order an illegal magazine.

Had the Postal Service left Jacobson alone, he would have, on the basis of his past life, continued to be a law-abiding man, caring for his parents, farming his land, and minding his own business. Now he stands disgraced in his home and his community with no visible gain to the Postal Service in the important fight against the sexual exploitation of children.

The majority is concerned about unduly limiting the government's investigation of crime. I cannot accept this view, particularly because the government itself rejects the tactics used here as unacceptable.

An argument can, of course, be made that the administrative agency itself should enforce the policy against the targeting of individuals unless a reasonable suspicion exists for so doing, and well it should. The Postal Service should have done so here by vetoing the local decision to pursue Jacobson. But when an important constitutional right is involved, we should not shrink from requiring that a federal policy be followed. Of course, Jacobson has no right to be free from investigation; all of use, judges included, have no such right. But here the government unlawfully undertook to induce him to violate the law with repeated solicitations to buy obscene materials. Before commencing the sting, the government had no evidence that Jacobson had ever purchased or possessed such materials or desired to do so.

Jacobson, a 57-year old resident of Newman Grove, Nebraska, currently lives on his family farm and supports his parents. He enlisted in the United States Navy in 1951. During his tour of duty, he served on a destroyer in the Korean theater. He was honorably discharged in 1955. He enlisted in the United States Army in 1958. He served in the Korean and European theaters and was decorated for his service. He retired from the Army in 1974.

On returning to Nebraska, Jacobson became a school bus driver and served in that capacity for ten years. Upon his retirement, he received a certificate of commendation from the Board of Education. There is not a hint in his 20-year service record of participation in illegal or improper sexual activities, and his record as a school bus driver is unblemished. He has no criminal history, with the exception of a conviction for driving while intoxicated in 1958.

On February 4, 1984, Jacobson ordered two magazines and a brochure from Dennis Odom, who did business as the Electric Moon in San Diego, California. On May 11, 1984, the government executed a search warrant on the Electric Moon business premises and seized the business's mailing list. Jacobson's name and address were on that mailing list.

The two magazines Jacobson ordered were "Bare Boys I" and "Bare Boys II." They were nudist magazines, the receipt of which did not violate any law. Receipts for his order were found in Blue Moon's files. The government had no information at the time it instituted the sting that Jacobson had purchased obscene materials through the mails or that he produced child pornography or that he was predisposed to do either.

Nevertheless, the government made Jacobson the target of five undercover sting operations involving at least twelve separate mail solicitations over a period of two

and one-half years. Jacobson answered a survey sent to him during the first undercover operation. In his response, he indicated an interest in material about preteen sex. The government, in the guise of five separate, fictitious organizations and one fictitious individual, contacted Jacobson through the mail eleven more times before he finally ordered "Boys Who Love Boys," an admittedly obscene magazine. After sending him this publication, government agents arrested Jacobson and searched his home. No other illegal materials were found.

I adhere to the views I expressed in our panel opinion that Jacobson's Electric Moon purchase did not evidence a predisposition to purchase illegal child pornography and thus did not give rise to a reasonable suspicion that Jacobson had committed a crime in the past or was likely to commit one in the future. I continue to believe that the government must have such a reasonable suspicion before instituting an undercover sting directed at an individual, *see United States v. Luttrell*, 889 F.2d 806, 813 (9th Cir. 1989), *reh'g en banc granted*, 906 F.2d 1384 (9th Cir. July 12, 1990), and that because no such suspicion existed in this case, Jacobson's conviction must be set aside. Additionally, I believe that the Postal Service's repeated solicitation of Jacobson to purchase illegal pornography constituted conduct so outrageous and offensive that a conviction arising therefrom offends due process principles. *See United States v. Russell*, 411 U.S. 423, 431-32 (1973).

The requirement that law enforcement officials have a reasonable suspicion of actual or potential criminal behavior before targeting an individual for an undercover investigation is consistent with the investigative policies of the United States Attorney General, the FBI, and the United States Postal Service. The Attorney General's guidelines on FBI undercover operations provide that undercover operations offering an inducement to illegal activities are not to be approved unless:

- (a) there is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or
- (b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

Office of the Attorney General, Attorney General's Guidelines on FBI Undercover Operations 16 (Dec. 31, 1980), reprinted in *Law Enforcement Undercover Activities: Hearings before the Select Comm. to Study Law Enforcement Undercover Activities of Components of the Dep't of Justice*, U.S. Senate, 97th Cong., 2d Sess. 86, 101 (1982) [hereinafter *Senate Hearings*]; see also Office of the Attorney General, Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations 1 (Dec. 2, 1980), reprinted in *Senate Hearings*, supra, at 121 ("A key principle underlying these practices, and reflected in these Guidelines, is that individuals and organizations should be free from law enforcement scrutiny that is undertaken without a valid factual predicate and without a valid law enforcement purpose.").¹

¹ William H. Webster, then director of the FBI, endorsed a reasonable suspicion standard for undercover investigations in his testimony during the Senate hearings on Justice Department undercover operations:

[O]ne of the basic standards for initiating an operation or for making a change in direction or a change in focus, which is one of the sore points we have observed in these various operations, currently appears in the Attorney General's Guidelines on Criminal Investigations, and that is that there must be facts or circumstances that reasonably indicate that a Federal criminal violation of the type to be investigated has occurred,

Additionally, Raymond J. Mack, an inspector with the United States Postal Inspection Service, testified at Jacobson's trial that the purpose of Postal Service testing programs was "to bring us into contact with individuals that have committed some type of criminal offense or [are] in the act of committing a criminal offense." Trial transcript at 92. To that end, according to Mack, Postal Inspection Service sting operations were to be directed only at those individuals whose names appeared independently on at least two lists acquired from the following sources: a mailing lists seized by postal inspectors in separate child pornography investigations; incoming child pornography seized by the United States Customs Service; programs conducted by the FBI; investigations of mail order dealers of child pornography conducted by metropolitan police departments and state police agencies; or Postal Inspection Service regional testing programs. Trial transcript at 95, 97, 146-47. Calvin M. Comfort, a prohibited mailing specialist with the Postal Inspection Service, acknowledged at trial that the sole independent source on which Jacobson's name appeared was the Electric Moon mailing list. Trial transcript at 346.

The majority cites five cases from other circuits as holding that "the Constitution does not require reasonable suspicion of wrongdoing before the government can begin an undercover investigation" of a particular individual. One of these cases appears to be on point. See *United States v. Gamble*, 737 F.2d 853 (10th Cir. 1984). In that case, the court allowed the defendant's conviction

is occurring, or is likely to occur. In other words, a reasonable cause provision.

Senate Hearings, supra, at 1041 (statement of Hon. William H. Webster); see also *id.* at 1055 ("We have come pretty close to it in the investigative guidelines that are already there, if we are talking about a reasonable suspicion basis. I have no problem with requiring an articulation of the reasons. I think we are doing that now, and we will certainly do it in the future.").

to stand despite its finding that government agents fabricated criminal schemes to enmesh a black doctor with no criminal record about whom the agents had "no apparent hint of a predisposition to criminal activity." *Id.* at 860.

In *United States v. Thoma*, 726 F.2d 1191 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984), the court acknowledged that the government had a good faith basis for investigating the defendant. *Id.* at 1198. Its subsequent statement that such a basis is not a constitutional prerequisite to an undercover investigation is therefore dictum. *See id.* at 1198-99. In *United States v. Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982), an attorney with a "proven ability to enlist corrupt politicians" provided the government with the defendants' names. *Id.* at 609. The Third Circuit concluded that this source "provided the government with a reasonable basis for the initiation of the bribe offers" it made to the defendants. *Id.* In an alternative holding, the court stated: "Where the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without *probable cause* does not bar the conviction of those who rise to its bait." *Id.* (emphasis added). The *Jannotti* court expressed no opinion as to whether an investigation commenced without a degree of suspicion less than that required for probable cause, or with no suspicion at all, would offend due process.

In *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985), the District of Columbia Circuit rejected the contention of a former United States congressman that the FBI's targeting of him in the ABSCAM sting without a reasonable suspicion of criminal behavior violated due process. The court relied on *United State v. Kelly*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 464 U.S. 908 (1983), an earlier appeal in another ABSCAM prosecution. The *Kelly* court stated:

[B]ecause *dishonest public officials*, responsive more to money than to their obligations to the nation, may cause grave harm to our society, we recognize the need for law enforcement efforts to detect *official corruption*. Furthermore, such corruption is "that type of elusive, difficult to detect, covert crime which may justify Government infiltration and undercover activities."

Id. at 1473-74 (emphasis added) (citation omitted). The court considered the "genuine need to detect corrupt public officials as well as the difficulties inherent in doing so" to conclude that the FBI's targeting of Congressman Kelly did not constitute intolerable government conduct. *Id.* at 1474. The *Jenrette* court recognized that *Kelly's* holding was premised on law enforcement needs in detecting official corruption, observing that "other courts of appeal have considered and rejected the contention that the government must have a reasonable suspicion of wrongdoing before offering a bribe to a *public official*." 744 F.2d at 824 n. 13 (emphasis added) (citations omitted).

Similarly, in *United States v. Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), the Second Circuit rejected the argument that the Constitution requires "The Executive Branch [to] demonstrate some basis of suspicion (short of probable cause) before deciding to make any *Member of Congress* the target of a sting." *Id.* at 941 (emphasis added). The court based its rejection of such a requirement, in part, on the limitations the Speech or Debate Clause places on the conduct of a congressman that may be made the basis of a prosecution and the evidence that may be used against him. *Id.*

Two factors motivating the holdings in *Jenrette* and *Myers*, the need to detect official corruption and the constitutional safeguards available to congressmen-targets of the ABSCAM sting, are absent from the government's

targeting and prosecution of Jacobson. Thus, we need not decide in this case whether we should follow them.

Additionally, I believe the conduct of the Postal Service's sting operations involving Jacobson was so outrageous that the prosecution arising therefrom violates Jacobson's due process rights. Once the Postal Service obtained Jacobson's name from the Electric Moon mailing list, its operatives commenced a two and one-half year campaign of deceptive mail solicitations whose sole object was to induce Jacobson to commit a crime "merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs." *United States v. Twigg*, 588 F.2d 373, 381 (3d Cir. 1978).

The Postal Service first contacted Jacobson through a sting operation called "The American Hedonist Society," "a private, members only society for those who adhere to the doctrine that pleasure and happiness is the sole good in life." Government Exhibit 7. Jacobson completed the purportedly confidential questionnaire, indicating an interest in preteen sexual material. The Postal Service then "enrolled" Jacobson in the American Hedonist Society and began sending him the Society's newsletters, which advertised sexually explicit materials for sale. Jacobson never ordered any of the advertised materials.

The Postal Service then approached Jacobson through "Midlands Data Research," "a small, old established firm in Lincoln, Nebraska" which purported to conduct "consumer surveys on a variety of subjects." Government Exhibit 8. The mailing included a questionnaire and a letter which stated: "If you believe in the joys of sex and the complete awareness of those lusty and youthful lads and lasses of the neophyte [sic] age, we would like to hear from you." *Id.* Jacobson responded that Midlands Data Research should feel free to send him further information, but did not answer the questionnaire.

Jacobson's failure to complete the questionnaire prompted the Postal Service to send another letter and questionnaire from the "Heartland Institute for a New Tomorrow" (HINT). HINT described itself as a lobbying organization "founded to protect and promote sexual freedom and freedom of choice" by urging the repeal of "arbitrarily imposed legislative sanctions restricting your sexual freedom." Exhibit 102. The HINT letter asked Jacobson to reconsider his refusal to participate in the Midlands Data Research survey. Jacobson responded by completing the HINT questionnaire.

The Postal Service next sent Jacobson a letter from the director of HINT, which stated:

We at HINT have computer matched your response with the responses of others who have similarly completed our survey questionnaire. Enclosed with this correspondence you will find a list of persons with backgrounds and interests similar to yours. Won't you take a little time in the interest of sexual freedom and write to one of the persons on the list? It's the only way to overcome the pressures of society which come to bear on each of us.

We welcome any comments or suggestions you might have concerning HINT or its programs.

Defendant's Exhibit 113. Jacobson neither responded to this letter nor wrote to any of the individuals on the accompanying list.

The Postal Service next used a technique known as "mirroring" to acquire further information from Jacobson. A postal inspector posing as "Carl Long," a supporter of HINT with interests similar to Jacobson's, wrote to Jacobson stating that he collected erotic literature and wished to correspond with him. Government Exhibit 11; trial transcript at 342. Jacobson replied that he too collected erotica and would be willing to correspond. Government Exhibit 12. Long responded, inquiring about Jacobson's interest in amateur sex videos.

Government Exhibit 13. Jacobson again wrote to Long, noting that amateur videotapes were difficult to acquire, naming several film sources, and stating that he preferred "good looking young guys (in their late teens and early 20's)." Government Exhibit 14. Jacobson failed to answer a third letter from Long.

After Jacobson ceased writing to Long, the Postal Service again contacted Jacobson, posing as the "Far Eastern Trading Company Ltd." of Hong Kong and "Produit Outaouais" of Quebec, two mail-order retailers of erotica. After receiving a second mail solicitation, Jacobson ordered "Boys Who Love Boys" from the Far Eastern Trading Company. When the Postal Service delivered the magazine to Jacobson, he was arrested, charged with, and convicted of knowingly receiving through the mails sexually explicit material depicting a minor.

Jacobson's conviction thus was the culmination of the Postal Service's two and one-half year campaign to induce this heretofore law-abiding farmer to violate the obscenity laws. Posing as an imaginative variety of spurious organizations and individuals, all apparently legitimate, the Postal Service first engaged Jacobson in a dialogue about erotica, then presented him with a series of opportunities to purchase government-compiled pornography through the mails. When Jacobson failed to complete a Postal Service questionnaire, the Postal Service sent him another and urged him to reconsider responding. When Jacobson ceased corresponding with a Postal Service "pen pal," the Postal Service renewed its approach under the guise of two fictitious purveyors of erotica who assured Jacobson that their mailings would not run afoul of United States Customs.

In its pursuit of Jacobson, I believe the Postal Service's direct and continuous involvement in the creation and maintenance of opportunities for criminal activity rises to that demonstrable level of outrageousness which violates due process. See *Hampton v. United States*, 425

U.S. 484, 495 n.7 (1976) (Powell, J., concurring); see also *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) ("When the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative.").

Moreover, all the time, effort, expense, and ingenuity invested in apprehending Jacobson yielded only a single conviction of a single individual for the receipt of a single obscene magazine that would never have entered the United States mails had the Postal Service not deposited it there in the first place. The investigation of Jacobson produced no new evidence against existing pornography producers or purchasers and did nothing to further the goal of preventing the sexual exploitation of minors. As the Seventh Circuit has observed:

If the police entice someone to commit a crime who would not have done so without their blandishments, and then arrest him and he is prosecuted, convicted, and punished, law enforcement resources are squandered in the following sense: resources that could and should have been used in an effort to reduce the nation's unacceptably high crime rate are used instead in the entirely sterile activity of first inciting and then punishing a crime.

United States v. Kaminski, 703 F.2d 1004, 1010 (7th Cir. 1983) (Posner, J., concurring).

In my view, the government's investigation and prosecution of Jacobson amounts to the deliberate manufacture of a crime that would never have occurred but for the Postal Service's overzealous efforts to create it. Jacobson's conviction should be reversed. Accordingly, I dissent.

A true copy:

Teste:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2097

UNITED STATES OF AMERICA,
v. *Appellee,*
KEITH M. JACOBSON,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

Submitted: February 14, 1989

Filed: January 12, 1990

Before LAY, Chief Judge, HEANEY, Senior Circuit
Judge, and FAGG, Circuit Judge.

HEANEY, Senior Circuit Judge.

Keith Jacobson was convicted of one count of receiving child pornography through the mails. On appeal, Jacobson argues that he was entrapped as a matter of law because the government failed to show that he was predisposed to commit the crime and that the government's outrageous conduct gave rise to a violation of due process. We overturn the conviction because, before instituting an undercover operation at Jacobson, the government had no evidence giving rise to a reasonable suspicion that Jacobson had committed a similar crime in the past or was likely to commit such a crime in the future.

I. BACKGROUND

Keith Jacobson is a fifty-seven year old resident of Newman Grove, Nebraska, currently living on a family farm and supporting his parents. Jacobson served in the Korean and Vietnam Wars, for which he received the Bronze Star and the Army Commendation Medal. He has no criminal history, with the exception of a conviction for driving while intoxicated in 1958.

On February 4, 1984, Jacobson ordered two magazines and a brochure from Dennis Odom, who does business as the Electric Moon in San Diego, California. On May 11, 1984, the government executed a search warrant on the Electric Moon business premises and seized the business' mailing list. Jacobson's name and address were on that mailing list.

The two magazines Jacobson ordered were "Bare Boys I" and "Bare Boys II." They were nudist magazines, the receipt of which did not violate any law. Receipts for his order were found in Blue Moon's files. Jacobson also ordered a brochure in which he failed to order any materials or contact any of the sources listed. The government had no other information at the time that Jacobson was purchasing through the mails or producing child pornography, or that he was predisposed to do either.

Nevertheless, the government made Jacobson the target of five undercover sting operations over a period of two and one-half years. Various postal inspectors surreptitiously contacted Jacobson more than eleven times. Jacobson answered a survey sent to him during the first undercover operation. In his response, he indicated a predisposition to receive through the mails sexually explicit materials depicting children. After several opportunities to purchase such materials under government observation, Jacobson ordered "Boys Who Love Boys," a magazine containing sexually explicit materials depicting minors. After sending him this publication, government agents

arrested Jacobson and searched his home. No other illegal materials were found.

The government indicted Jacobson on September 14, 1987, on one count of receiving through the mails a visual depiction, the production of which involved the use of a minor engaging in sexually explicit conduct. Jacobson was tried in front of a jury consisting of nine women and three men on April 22, 1988. On April 26, 1988, the jury returned a verdict of guilty. The judge sentenced Jacobson to two years probation and 250 hours of community service.

II. DISCUSSION

Jacobson raises several arguments on appeal, but at the heart of each argument is the assertion that the government lacked a basis for making Jacobson a target of an undercover operation. In response, the government argues that, while his purchase of the two magazines from Electric Moon constituted legal conduct, the purchases evidenced a predisposition to purchase illegal child pornography. Our view is threefold: (1) the Electric Moon purchase was not evidence of predisposition and did not give rise to a reasonable suspicion based on articulable facts that Jacobson had committed a crime in the past or was likely to commit a crime in the future; (2) the government must have reasonable suspicion based on articulable facts before instituting an undercover operation directed at a person; and (3) since the undercover operation was improper, Jacobson's conviction must be set aside because there was no evidence of an intervening act which cured the government's improper conduct.

The government asserts in its brief that the Electric Moon purchase was sufficient evidence of predisposition to justify the institution of an undercover operation against Jacobson. We disagree. In our view, at the time it commenced its undercover operation, the government had no evidence giving rise to a reasonable suspicion that

Jacobson had committed a crime or was about to commit one. This is simply a case where a legal act took place and the government directed an extensive undercover operation at the person who committed the legal act. When an individual engages in legal conduct and no additional or extrinsic evidence exists to give use to a reasonable suspicion of predisposition, the government may not target that individual, no matter how distasteful the lawful conduct may be. Obviously, had the government learned, prior to targeting Jacobson, that he had purchased or had expressed a desire to purchase illegal materials or that he had otherwise engaged in illegal conduct, there would have been sufficient cause to justify the decision to offer Jacobson the opportunity to purchase illegal materials through the mail.

This case is clearly distinguishable from the cases reaching the appellate level cited by the government in its brief. First, the government had received no information that Jacobson was purchasing illegal child pornography through the mails or that he was producing illegal child pornography. See *United States v. Emmert*, 829 F.2d 805, 807 (9th Cir. 1987); *United States v. Irving*, 827 F.2d 390, 391 (8th Cir. 1987); *United States v. Lard*, 734 F.2d 1290, 1292 (8th Cir. 1984); *United States v. Thoma*, 726 F.2d 1191, 1194 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); *United States v. Leja*, 563 F.2d 244, 245 (6th Cir. 1977), cert. denied, 434 U.S. 1074 (1978). Second, Jacobson had never ordered or advertised for any illegal materials. See *United States v. Rubio*, 834 F.2d 442, 445 (5th Cir. 1987); *United States v. Goodwin*, 674 F. Supp. 1211, 1213 (E.D. Va. 1987), aff'd, 854 F.2d 33 (4th Cir. 1988). Third, the government did not inadvertently target Jacobson as a result of pre-existing investigations. See *United States v. Esch*, 832 F.2d 531, 533 (10th Cir. 1987), cert. denied, 108 S. Ct. 1084 (1988); *United States v. Quinn*, 543 F.2d 640, 643 (8th Cir. 1976). Fourth, there were no independent articulable facts that gave rise to the suspicion

that Jacobson had committed a crime or was likely to commit a crime. See *United States v. Dawson*, 467 F.2d 668, 674 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973).

The government argues that, even if it did not have grounds for initially targeting Jacobson, his actions in response to the targeting indicated that he was predisposed to commit the crime, and his conviction should therefore be confirmed. We cannot agree. To accept this position would be to allow government agents to target entire groups of people without specific justification, hoping to uncover some individual who is predisposed to commit a crime if given enough opportunities to do so. The government must reasonably suspect that a crime has occurred or is likely to occur before targeting an individual. Evidence tending towards a reasonable suspicion obtained during an illegal targeting operation may be used to defend against a claim of entrapment only if received independent of the illegal sting operation. Cf. *Wong Sun v. United States*, 371 U.S. 471 (1963). No such evidence exists in this case.

The government recognized that there must be limits on its power to investigate during its review of the ABSCAM sting operation. During congressional hearings, the Federal Bureau of Investigation (FBI) made clear that it had targeted only those persons who had been identified by a reliable source as predisposed to take or offer a bribe, thus giving rise to a reasonable suspicion that the targeted individuals would commit a crime if offered the opportunity to do so. Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice, S. Rep. No. 682, 97th Cong., 2d Sess. 13 (1982).¹

¹ In each of the ABSCAM cases, reasonable suspicion does appear from the record. *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984); *United States v. Silvestri*, 719 F.2d 577 (2d Cir. 1983); *Ciuzio v. United States*, 718 F.2d 413 (D.C. Cir. 1983), *cert. denied*,

In our view, reasonable suspicion based on articulable facts is a threshold limitation on the authority of government agents to target an individual for an undercover sting operation. If a particular individual's conduct gives rise to reasonable suspicion, the government may conduct any undercover operation it so desires, as long as it does not give rise to a claim of outrageousness. *United States v. Lard*, 734 F.2d 1290, 1296-97 (8th Cir. 1984). While the use of undercover operations is indispensable to the achievement of effective law enforcement, the potential harms of undercover operations call for the recognition that there must be some limitation on the indiscriminate use of such government targeting.²

At the time the government targeted Jacobson, it had no reason to believe that he was likely to commit an act

104 S.Ct. 1305 (1984); *Weisz v. United States*, *id.* (Ciuzio and Weisz were tried together); *Thompson v. United States*, 710 F.2d 915 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 702 (1984); *Williams v. United States*, 705 F.2d 603 (2d Cir.), *cert. denied*, 104 S.Ct. 524 (1984); *Kelly v. United States*, 707 F.2d 1460 (D.C. Cir.), *cert. denied*, 104 S.Ct. 264 (1983); *Myers v. United States*, 692 F.2d 828 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *Carpentier v. United States*, 689 F.2d 21 (2d Cir. 1982), *cert. denied*, 459 U.S. 1108 (1983); *Alexandro v. United States*, 675 F.2d 34 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); *Jannotti v. United States*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982). Only three of the cases, however, dealt specifically with the requirement of reasonable suspicion. *United States v. Kelly*, 707 F.2d 1460, 1471 (D.C. Cir. 1983) (without deciding whether reasonable suspicion is required, the court found that there was ample suspicion to justify targeting Kelly); *United States v. Jannotti*, 673 F.2d 578, 609 (3d Cir. 1982) (lack of reasonable suspicion does not offend due process); *United States v. Myers*, 635 F.2d 932, 941 (2d Cir. 1980) (lack of reasonable suspicion does not offend due process or the speech or debate clause).

² These potential harms include the creation of crime, the entrapment of innocent persons, the destruction of the reputations of innocent persons, extensive fishing expeditions among innocent citizens, the creation of an air of distrust amongst colleagues and acquaintances and the subjecting of government agents to tremendous temptations, dangers and stresses.

which would violate federal obscenity laws. No evidence was subsequently obtained outside of the undercover operation. The evidence that Jacobson was predisposed to commit the crime for which he was convicted is tainted by the illegal targeting. We hold that Jacobson was entrapped as a matter of law. We therefore reverse his conviction and vacate his sentence.

FAGG, Circuit Judge, dissenting.

The panel has declared war on the government's power to initiate undercover investigations. Thus, I dissent.

I take issue with the panel's disinclination to apply the controlling standard of review. This court reviews the government's involvement in undercover investigations under due process principles. *United States v. Irving*, 827 F.2d 390, 393 (8th Cir. 1987) (per curiam). The same is true of other courts of appeals. See *United States v. Luttrell*, 809 F.2d 806, — (9th Cir. 1989) (suspicionless undercover investigations offend due process); *United States v. Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988) (due process does not require probable cause for an undercover investigation); *United States v. Jenrette*, 744 F.2d 817, 823-24 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985) (due process does not require reasonable suspicion of wrongdoing for an undercover investigation); *United States v. Gamble*, 737 F.2d 853, 856-60 (10th Cir. 1984) (same); *United States v. Myers*, 635 F.2d 932, 841 (2d Cir.), cert. denied, 449 U.S. 956 (1980) (same).

Instead of deciding whether the government's conduct in formulating, implementing, and enmeshing Jacobson in the investigatory scheme was fundamentally unfair, *Irving*, 827 F.2d at 393, the panel has barred the government from obtaining a conviction because the undercover investigation was initiated without "reasonable suspicion based on articulable facts" that Jacobson had committed or was likely to commit a similar crime, ante at 1, 3.

This bar applies even when the overall character of the government's investigation "does not give rise to a claim of outrageousness." *Id.* at 6. In my view, due process does not require an objectively quantified suspicion that approaches the threshold of probable cause. See *Garionis v. Newton*, 827 F.2d 306, 309 (8th Cir. 1987). I believe the government can act on legitimately grounded suspicions without depriving the suspected person of any right secured by the constitution. The panel's demand for particularized suspicion runs against the grain "of the post-*Hampton* cases decided by the courts of appeals [holding] that due process grants wide leeway to law enforcement agents in their investigation of crime." *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983); see also *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring).

In my opinion, the panel has borrowed from the rule of probable cause to arrest, *Garionis*, 827 F.2d at 309, and from the rule of particularized suspicion that governs brief investigatory detentions, *Terry v. Ohio*, 392 U.S. 1, 16-19, 21 (1968), for the singular purpose of narrowing the government's power to initiate undercover investigations. Needless to say, law enforcement decisions to conduct undercover investigations are not controlled by fourth amendment doctrine. Furthermore, the terminology that functions as the backbone of the panel's rule "[is] not self-defining [and the terminology] fall[s] short of providing clear guidance dispositive of the myriad factual situations that arise" when the government invokes its investigative powers to penetrate the shadowy world of crime. See *United States v. Cortez*, 449 U.S. 411, 417 (1981). At bottom, the panel's rule-making runs squarely into "the difficulties attending the notion that due process of law can be embodied in fixed rules." *United States v. Russell*, 411 U.S. 423, 431 (1973).

If the panel believes the government has violated due process by embarking on a suspicionless investigation

against Jacobson, it should say so. *Luttrell*, 889 F.2d at —. The record, however, does not support that conclusion. Indeed, on the record presented here the government's undercover investigation fits within the terms of the very rule the panel proposes.

The government possessed well-grounded reasons to believe that an investigation aimed at Jacobson would uncover criminal behavior. *Id.* at —. Jacobson's name was found in the customer records of a reputed child pornographer. This discovery identified Jacobson as a person who had previously ordered child erotica through the mails. The customer records also disclosed that Jacobson had obtained a brochure outlining the methods of purchasing child pornography. With this information in the hands of experienced postal inspectors, I am at a loss to understand how the panel finds room to "criticize the government for reasonably pursuing available leads" concerning Jacobson's appetite for sexually explicit portrayals of children. *United States v. Hunt*, 749 F.2d 1078, 1087 (4th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985). The panel concedes that Jacobson's response to a survey mailed to him by the postal inspectors "indicated a predisposition to receive through the mails sexually explicit materials depicting children," *ante* at 2, and "justif[ied] the decision to offer Jacobson the opportunity to purchase illegal materials through the mail," *id.* at 4.

It seems to me the panel is wearing blinders. This is not a case where the government was in the business of generating new crimes merely for the sake of pressing criminal charges against an individual who was "scrupulously conforming to the requirements of the law." *Luttrell*, 889 F.2d at —. Jacobson was not targeted in advance. To the contrary, the government had a significant amount of knowledge about Jacobson's shadowy activities, and he was targeted for investigation because of his own voluntary conduct.

What the panel has chosen to ignore in this case is the practical reality that the investigatory process does not deal with hard certainties. Law enforcement officers are entitled to draw inferences, make deductions, and arrive at common sense conclusions about human behavior based on available information and the behavioral patterns of law breakers. *See Cortez*, 449 U.S. at 418-19. The accumulated information must be "seen and weighed not in terms of [judicial post mortems], but as understood by those versed in the field of law enforcement." *Id.* at 418. When the whole picture known to the postal inspectors is viewed in this context, the officers clearly possessed legitimate grounds for their suspicion of Jacobson and for their belief that an undercover approachment of Jacobson would reveal criminal activity. *Id.* at 419. "Here, fact on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on [Jacobson]." *Id.* Simply stated, the panel is unwilling to acknowledge that it is looking at reasonable police work. *Id.*

Although the normal constitutional and statutory protections of criminal process have always been available to Jacobson, he necessarily wages his legal battle against the government's decision to investigate him as a question of law because the jury has rejected his entrapment defense. This court "may someday be presented with a situation in which the conduct of law enforcement agents [in initiating an undercover investigation] is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, [but Jacobson's case] is distinctly not of that breed." *Russell*, 411 U.S. at 431-32. I thus dissent from the panel's decision to overturn Jacobson's conviction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

30a

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2097NE

UNITED STATES OF AMERICA,
Appellee,
vs.
KEITH M. JACOBSEN,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 15, 1990

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 11/06/90

31a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR 87-0-77

UNITED STATES OF AMERICA

v.

KEITH M. JACOBSON
P.O. Box 57
Newman Grove, NE 68758

JUDGMENT IN A CRIMINAL CASE

[Filed Jul. 1, 1988]

George H. Moyer, Jr., Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

☐ guilty ☐ nolo contendere] as to count(s) _____,
and ☒ not guilty as to count(s) I.

THERE WAS A:

☐ finding ☒ verdict] of guilty as to count(s) I.

THERE WAS A:

☐ finding ☐ verdict] of not guilty as to count(s)
N/A.

☐ judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/
these count(s).

THE DEFENDANT IS CONVICTED OF THE OF-
FENSE(S) OF: receipt of sexually explicit material in
violation of Title 18, United States Code, section 2252

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is sentenced to the custody of the Attorney General for a period of imprisonment of three (3) years, however the Court now suspends the sentence of imprisonment and places the defendant on Probation for a period of two (2) years with the following Special Conditions:

- 1) the defendant shall serve 250 hours of Community Service under the direction of the Probation Office
- 2) the defendant shall pay the Taxable Cost and the Special Assessment during the term of Probation.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

- (1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
- (2) associate only with law-abiding persons and maintain reasonable hours;
- (3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
- (4) not leave the judicial district without permission of the probation officer;
- (5) notify your probation officer immediately of any changes in your place of residence;
- (6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of \$50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) T as follows:

IT IS FURTHER ORDERED that counts N/A are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

☐ The Court orders commitment to the custody of the Attorney General and recommends:

June 30, 1988

Date of Imposition of Sentence

/s/ Lyle E. Strom
Signature of Judicial Officer
LYLE E. STROM
Chief Judge
Name and Title of Judicial Officer

June 30, 1988

Date

34a

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney
General, with a certified copy of this Judgment in a
Criminal Case.

United States Marshal

By _____
Deputy Marshal

35a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR. 87-0-77

UNITED STATES OF AMERICA,
Plaintiff,

v.

KEITH M. JACOBSEN,
Defendant.

VERDICT

We, the jury empaneled to try this cause, find the de-
fendant, Keith M. Jacobsen, guilty as charged in the in-
dictment.

DATED this 26 day of April, 1988.

/s/ Henry C. Hill
Foreperson